IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.272 of 2004

Date of decision: July 10, 2007

Krishan Kumar **…Appellant.**

Versus

State of H.P. **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Anup Chitkara, Advocate.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge(Oral)

Appellant has been convicted of an offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, for allegedly possessing 1.500 kgs. *Charas* and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default of payment of fine to undergo simple imprisonment for a further period of two years.

2. Prosecution story, as per record, is like this. On the night intervening 30th April and 1st May, 2003, a *Naka* was organized by a police party headed by PW-2 Inspector Jitender Kumar at a place called Panjpula within the area of Police Station, Dalhousie. At 1.30 a.m., a bus came from Chamba side. It was got stopped for routine checking of the passengers and their luggage. A passenger sitting on seat No.36 was having a polythene bag in his lap, which contained

---

Whether reporters of the local papers may be allowed to see the judgment?

Charas. That man was made to deboard the bus. Outside the bus, proceedings of search and seizure were conducted. At 2.45 a.m., after completing the proceedings of search and seizure, PW-12 Inspector Jitender Kumar entered the bus again to carry out the checking and search of other passengers. Passenger occupying seat No.35 was found to have kept something wrapped in a white cloth sheet on his thighs. This passenger was the appellant. On search, the stuff wrapped in the cloth sheet was found to be *Charas*, which weighed 1.500 kgs. Two samples each weighing 25 grams were separated. Samples and the bulk *Charas* were made into separate parcels and the parcels were sealed with a seal which produced an impression of letter 'T' of English alphabet. Sample was sent to Chemical Examiner, who reported that the stuff contained resin to the extent of 26.23 per cent.

3. Appellant was sent up for trial. He was charged for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. He pleaded not guilty and was, therefore, put on trial. At the end of the trial, he was found guilty and convicted and sentenced, as aforesaid.

4. We have heard the learned counsel for the appellant as also the learned Additional Advocate General and gone through the record.

5. As per prosecution version, the search was conducted in the presence of two independent witnesses, namely the conductor and the driver of the bus. Both of them were examined as witnesses during the course of the trial. PW-1 Yog Raj is the driver and PW-2 Raj Kumar is the conductor of the bus. They did not support the prosecution version. They were cross-examined by the prosecution with the leave of the Court. However, the statements, under Section 161 of the Code

of Criminal Procedure, with which they were confronted in the course of their cross-examination by the prosecution, do not pertain to this case but to the case against the other passenger named Satish Kumar, who was allegedly checked and searched before the checking and search of the appellant. Learned counsel for the appellant says that because the two witnesses were not confronted with any statement pertaining to this case, there cannot be any escape from the finding that in the present case no statement of theirs was recorded and in any case it cannot be said that they stand contradicted by their previous statements under Section 161 of the Code of Criminal Procedure and, therefore, their testimony in the Court is not believable. We see no reason to reject the submission. The aforesaid two witnesses have denied the prosecution version that *Charas* was recovered from the appellant.

6. Learned Additional Advocate General has submitted that there is no reason to disbelieve the testimony of the Police Officer, who carried out the search, namely PW-12 Inspector Jitender Kumar, and two Constables, who were with him at the time of the search of the appellant, namely PW-5 Mohammad Aslam and PW-6 Rajinder Kumar. We might have closely scrutinized the testimony of these three witnesses and, on being satisfied on such scrutiny accepted the submission of the learned Additional Advocate General, but for some material contradictions appearing in the testimony of PW-12 Inspector Jitender Kumar, on one side, and PW-5 Mohammad Aslam and PW-6 Rajinder Kumar, on the other. According to the testimony of Jitender Kumar and also the version appearing in the FIR, it was at 2.45 a.m. during the course of second entry into the bus for conducting the checking and search of other passengers that the appellant occupying

seat No.35 was found to be having *Charas* wrapped in a white cloth sheet in his lap, but PW-5 Mohammad Aslam and PW-6 Rajinder Kumar say that *Charas* was recovered from the appellant at 1.30 a.m. These two witnesses nowhere say that search and checking of the passengers was conducted by PW-12 Inspector Jitender Kumar twice.

7. The abovestated position apart, testimony of PW-12 Inspector Jitender Kumar does not inspire confidence. He says that when he entered the bus, for the first time and recovered *Charas* from another passenger named Santosh Kumar occupying seat No.36, he did not notice anything in the lap of the present appellant, who was occupying the adjoining seat. It is not believable that when nothing was with the appellant at the time the police party entered the bus first, he would have picked up something incriminating from somewhere in the bus, even though belonging to himself, and placed the same in his lap, particularly when, according to the testimony of PW-12 Inspector Jitender Kumar, he had instructed the passengers not to leave their seats until he returned and also put some police officials as guard inside the bus to watch the movements of the passengers.

8. Also, we find that the evidence of the prosecution with regard to the depositing of the case property with the Incharge of the *Malkhana* of the concerned Police Station is doubtful. Even though PW-12 Inspector Jitender Kumar says that he had deposited the case property alongwith NCB form with Moharrar Head Constable Jagdish Chand (PW-10) and PW-10 Jagdish Chand also testifies so, yet in the *Malkhana* register probably there is no entry regarding the deposit of the case property. PW-10 HC Jagdish Chand, in the examination-in-chief, testified that entry was there in the *Malkhana* register but in the cross-examination he specifically stated that no entry was there in the

said register with respect to the case property. It appears that the statement made by the witness in the cross-examination is correct, because no copy of the entry in the *Malkhana* register regarding the deposit of the case property has been produced, even though the witness while in the witness box had the original *Malkhana* register with him.

9. In view of the abovestated position, we are of the considered view that the prosecution case does not stand proved beyond reasonable doubt. Hence, the appeal is accepted, judgment of the trial Court convicting and sentencing the appellant is set aside and he is acquitted. He, being in custody, is ordered to be released forthwith, in case his detention is not required in any other case.

10. Appeal stands disposed of.

(Surjit Singh), J

July 10, 2007(sd) **(Kuldip Singh), J**